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Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)
	)
AVR, L.P. d/b/a	)
Hyperion of Tennessee, L.P.	)
	)
Petition for Preemption of Tennessee Code	)
Annotated § 65-4-201(d) and Tennessee	)
Regulatory Authority Decision Denying	)
Hyperion's Application Requesting	)
Authority to Provide Service in Tennessee	)
Rural LEC Service Areas	)
	)

CC File No. 98-92

PETITION FOR PREEMPTION

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Dated: May 29, 1998

EXECUTIVE SUMMARY

Section 65-4-201(d) of the Tennessee Code, which was enacted prior to the federal Telecommunications Act of 1996 ("1996 Act"), prohibits local exchange telecommunications competition in areas of Tennessee served by carriers with fewer than 100,000 access lines within the state. AVR, L.P. d/b/a Hyperion of Tennessee, L.P.'s ("Hyperion") Certificate of Public Convenience and Necessity to provide telecommunications services in Tennessee contains a restriction reflecting this limitation. Hyperion is a facilities-based competitive local exchange carrier which has constructed an advanced fiber network in the Nashville, Tennessee area which can serve customers in adjacent areas to Nashville, some of which are currently served by the incumbent LEC Tennessee Telephone. Hyperion is unable to compete with Tennessee Telephone under Tennessee law, however, because Tennessee Telephone has slightly less than the required 100,000 access lines threshold in Tennessee.

Section 253(a) of the 1996 Act prohibits any state from enacting a statute or regulation that prohibits or has the effect of prohibiting any entity from providing any interstate or intrastate telecommunications service, subject to very limited exceptions articulated in Section 253(b). If any state statute or regulation violates Section 253(a), and does not fall within an exception under Section 253(b), the statute or regulation must be preempted by the Federal Communications Commission ("Commission") under Section 253(d).

Section 65-4-201(d) of the Tennessee Code is in direct conflict with Section 253(a) of the 1996 Act, which preempts such an anticompetitive statute. Section 65-4-201(d) is a blanket prohibition against competition in all areas of Tennessee served by incumbent LECs with fewer than

100,000 access lines in the state. Section 65-4-201(d) violates Section 253(a) of the 1996 Act. This Commission has previously considered two statutes that are virtually identical to Section 65-4-201(d), and has preempted both. The Commission clarified that Section 253(a), at a minimum, proscribes state and local legal requirements that prohibit all but one carrier from providing service in a particular state or locality.

Since the restriction on Hyperion's certificate was clearly contrary to federal law, Hyperion filed an application with the Tennessee Regulatory Authority ("TRA") seeking to expand its authority to include the areas served by Tennessee Telephone. The TRA denied Hyperion's application on the grounds that Section 65-4-201(d) prohibits competition in Tennessee Telephone's territory. That order is final. As a result, Hyperion hereby files this petition requesting that this Commission preempt Tennessee Code Section 65-4-201(d), and the TRA order enforcing the statute.

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PETITION FOR PREEMPTION

AVR, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), by its counsel, and pursuant to Federal Communications Commission ("Commission") Rule 1.1, 47 C.F.R. § 1.1 (1997), and Section 253 of the Telecommunications Act of 1996[1] ("1996 Act"), hereby requests that the Commission enter an order preempting TENN. CODE ANN. § 65-4-201(d)[2] and the Tennessee Regulatory Authority's ("TRA") April 9, 1998, order denying Hyperion's application for a Certificate of Public Convenience and Necessity ("CPCN") to provide service in areas of Tennessee

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[1] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et. seq.*).

[2] TENN. CODE ANN. § 65-4-201(d) is cited in the remainder of this Petition by section number alone.

served by Tennessee Telephone Company ("Denial Order").[3] A copy of this order is attached hereto as Exhibit A.

Statement of Interest

Hyperion and its affiliates operate twenty two (22) competitive local exchange networks in twelve (12) states throughout the United States. These networks currently serve thirty five (35) cities with approximately 4,000 route miles of fiber optic cable, and allow Hyperion and its operating affiliates to offer a broad range of telecommunications services. Through the construction of its own facilities, Hyperion has been able to provide service in many rural and outlying areas throughout the country, such as Coudersport and Scranton, Pennsylvania, and Swanton and Newport, Vermont. Hyperion has constructed an advanced fiber-based network in the Nashville, Tennessee area, and is in the process of extending its fiber network into numerous outlying areas within Tennessee, including the areas currently served by Tennessee Telephone Company ("Tennessee Tel."). As discussed below, Section 65-4-201(d) prevents Hyperion, or any other competitive local exchange carrier ("CLEC"), from competing with Tennessee Tel. or any other incumbent LEC with fewer than 100,000 access lines in Tennessee.[4] This statute, and the orders enforcing it, directly contravene

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[3] *In re: The Application of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served By Tennessee Telephone Company*, Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served By Tennessee Telephone Company, Docket No. 98-0001, (T.R.A. Apr. 9, 1998).

[4] Tennessee Tel. is a wholly-owned subsidiary of TDS Telecommunications Corporation ("TDS Telecom"), in turn a wholly owned subsidiary of Telephone & Data Systems, Inc., a publicly traded corporation with annual revenues exceeding $1 billion. TDS Telecom operates 105 telephone companies which serve approximately 493,000 access lines in 28 states. TDS Telecom has approximately 90,000 access lines in the state of Tennessee, as compared to the

Section 253(a) of the 1996 Act and Commission decisions addressing precisely this issue.

It is important to note that Hyperion requested only that it be certificated by the TRA to *provide telecommunications services* in Tennessee Tel's service territory. Hyperion did not request termination of any small or rural LEC exemption that Tennessee Tel may have claimed. In particular, Hyperion did not seek unbundled access to Tennessee Telephone's network elements, collocation, resold services at a wholesale discount, or any other additional obligation imposed on incumbent LECs in section 251(c) of the 1996 Act. Rather, Hyperion simply requested that it be authorized to offer its *own* services over its *own* facilities, and expected only that all competing LECs would abide by the obligations imposed on *all* local exchange carriers under Sections 251(a) (general duties of telecommunications carriers) and 251(b) (general duties of all local exchange carriers) of the 1996 Act.

Statement of Facts

On August 24, 1995, the Tennessee Public Service Commission ("TPSC")[5] granted Hyperion a CPCN to provide all forms of telecommunications services in Tennessee ("Certification Order" attached hereto as Exhibit B).[6] In granting this certificate, the TPSC specifically found that Hyperion possesses the requisite technical, managerial, and financial qualifications to render local exchange telecommunications services throughout the state of Tennessee. In the Certification Order,

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approximately 1,000 access lines that Hyperion currently has in Tennessee.

[5] The TPSC was the predecessor to the TRA.

[6] *In re: The Application of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Intrastate Point-to-Point and Telecommunications Access Service Within the State of Tennessee*, Order, Docket No. 94-00661, (T.P.S.C. Aug. 24, 1995).

however, the TPSC reserved the question as to whether Hyperion would be authorized to serve areas within Tennessee served by incumbents other than BellSouth and United Telephone Company. On March 8, 1996, constrained by the statutory limitations imposed by § 65-4-201(d), the TPSC issued an order restricting Hyperion's certificate to compete only in those areas of Tennessee which are currently served by entities that have 100,000 or greater access lines in Tennessee. A copy of this order is attached hereto as Exhibit C.

Having issued this order only one month after enactment of the 1996 Act, the TPSC did not address in its decision, Section 253(a) of the 1996 Act, which prohibits states from adopting statutes or regulations which prohibit or have the effect of prohibiting any entity from providing any interstate or intrastate telecommunications service. Since that time, the Commission has considered the validity of two state statutes that are virtually identical to Section 65-4-201(d) by excluding certain service areas from competition, and has preempted both. The Commission clarified that such provisions contravene Section 253(a), and are thus unenforceable. As a result, on January 2, 1998, Hyperion filed a Petition with the TRA requesting an extension of its authority to include the areas currently served by Tennessee Tel. ("January 2, 1998 Petition"),[7] since the previous restrictions imposed on Hyperion's certification were clearly unenforceable under federal law. On April 9, 1998, in a decision that directly contravenes the 1996 Act and Commission decisions, and despite

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[7] *In re: AVR, L.P. d/b/a Hyperion of Tennessee, L.P., Application For a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company*, Application, Docket No. 98-00001 (Filed Jan. 2, 1998). A copy of this Application is attached hereto as Exhibit D.

the strong dissent of its Chairman,[8] the TRA issued a 2-1 order denying Hyperion's application on the grounds that Section 65-4-201(d) prohibits competition in Tennessee Tel.'s service area.

I. Tennessee Law Prohibits Competition in Rural Areas

On June 6, 1995, prior to passage of the 1996 Act, the Tennessee Legislature enacted Chapter 408 of the Public Acts of 1995. Specifically, the Tennessee Legislature amended Section 65-4-201, attached hereto as Exhibit F, which provides:

> (b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Tennessee Regulatory Authority a certificate of convenience and necessity for such service or territory...
>
> (c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:
>
> > (1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and
> >
> > (2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

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[8] Chairman Greer stated that there is "a direct conflict between the federal law and one of our state statutes, and the federal law must prevail. I believe the federal act obviously preempts our state statute TCA 65-4-201(d) pursuant to the supremacy clause...upholding the Tennessee statute in this case would undermine competition and therefore contradicts the goals of the Telecommunications Act." *Transcript of March 10, 1998 Hearing Denying Hyperion's Application* at 7-8, attached hereto as Exhibit E.

> *(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.*[9]

(emphasis added). At issue in this proceeding is only the validity of Section 65-4-201(d). As stated previously, in issuing Hyperion a CPCN, the TPSC already determined that Hyperion possesses the technical, managerial and financial qualifications to render telecommunications services in Tennessee, and that Hyperion has satisfied all preconditions for providing such services. Only Section 65-4-201(d), which prevents CLECs from competing in areas served by incumbent LECs having fewer than 100,000 access lines, and subsequent TRA orders enforcing the statute, prohibit Hyperion from providing service in Tennessee Tel.'s territory. Hyperion petitions this Commission for relief to enforce the local competition provisions of the 1996 Act which expressly proscribe all barriers to entry, and to reassert that the Commission will preempt any statute, such as Section 65-4-201(d), that constitutes an insurmountable barrier to competitive entry.[10]

II. Authority For Federal Preemption of State Law

The Supremacy Clause of Article VI of the U.S. Constitution provides Congress with the power to preempt state law.[11] Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an actual or outright conflict between federal and state law, where compliance with federal and state law is in effect physically impossible,

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9 TENN. CODE ANN. § 65-4-201.

10 *See* 47 U.S.C. § 253(a).

11 Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986).

where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively (thus occupying an entire field of regulation and leaving no room for the States to supplement federal law), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.* at 368-69. It is well established that preemption may result not only from action taken by Congress itself, but also from a federal agency acting within the scope of its congressionally delegated authority. *Id.* at 369.

Congress specifically provided for Commission preemption of state law in Section 253 of the 1996 Act, which states:

> (a) IN GENERAL.---No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY.---Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> . . .
>
> (d) PREEMPTION.---If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[12]

Section 253(a) is an express preemption provision. Section 253(a) mandates that no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of *any* entity to

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[12] 47 U.S.C. § 253.

provide *any* interstate or intrastate telecommunications service. Section 65-4-201(d), which is an absolute barrier to competitive entry, stands directly in opposition to Section 253(a), and must yield to federal law. Section 253(a) requires that competition be permitted in all areas within all states. It is remarkable that any state commission today, upon consideration of Section 253(a), could issue a decision which categorically prohibits a CLEC from attempting to offer competitive services within areas of their state. This is precisely what the TRA has done. Fortunately, Congress has provided a remedy for such protectionist state commission action through Section 253(d), a provision which authorizes and requires that the Commission preempt state action that contravenes Section 253(a).

In assessing whether to preempt a statute or regulation, the Commission must first determine whether such statute or regulation is proscribed by the terms of § 253(a) of the 1996 Act.[13] If the Commission determines that a statute or regulation is proscribed by § 253(a), the Commission must then determine whether the legal requirement falls within the exception to § 253(a)'s proscription set forth in § 253(b). *Id.* If the statute or regulation is "impermissible under § 253(a), and do[es] not satisfy the requirements of section 253(b), [the Commission] must preempt the enforcement of those legal requirements in accordance with section 253(d)." *Id.*

The Commission has consistently recognized that *"section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing*

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[13] *In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, FCC 97-336, CCB Pol 97-1, ¶ 37 (Sep. 24, 1996) ("*Silver Star*").

telecommunications services in a particular State or locality."[14] As explained in the Commission's *Interconnection Order*, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets.[15] Congress primarily intended for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by providing for preemption under section 253(d) sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.[16] In specifically addressing the impact of section 253 on rural carriers, former Commissioner Chong asserted that while rural carriers face some unique circumstances that warrant some special regulatory treatment, rural carriers should not carry this argument too far.[17] Commissioner Chong stated that if rural carriers

> try to translate 'exceptions' for rural carriers into outright insulation against all competition, [rural carrier] arguments will fall on deaf ears...there is no question that Congress clearly envisioned that the benefits of competition should be spread across this great country. It did not want rural America left out of the Information revolution. *Id.*

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[14] *In the Matter of Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, CCBPol 96-10, FCC 96-397 at ¶ 25 (rel. Oct 1, 1996) ("Classic Telephone") (holding that Kansas municipalities' grant of exclusive franchise to a single telecommunications provider violates Section 253(a)) (emphasis added).

[15] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Red 15499 (1996) at ¶ 4 ("*Interconnection Order*"), Order on Reconsideration, CC Docket No. 96-98, 11 FCC Red 13042 (1996), *reversed in part, sub nom.* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1996) ("*Eighth Circuit Order*").

[16] Classic Telephone at ¶ 25.

[17] Commissioner Rachelle Chong, Address at the Western Rural Telephone Association's Fall Convention in Bloomington, Minnesota (Sep. 30, 1997).

III. Section 65-4-201(d) Does Not Qualify as an Exception Under Section 253(b) of the 1996 Act

In its Denial Order, the TRA conceded "that the plain language of Section 253(a) of the Act appears to preempt Tenn. Code Ann. § 65-4-201(d)."[18] Section 253(a) prohibits states from enacting statutes or regulations which prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service. The TRA, however, defended Section 65-4-201(d) on the grounds that the statute falls within Section 253(b)'s exception to Section 253(a)'s proscriptions. More directly, the TRA argued that Section 65-4-201(d) is competitively neutral, consistent with the 1996 Act's universal service provisions, and necessary to accomplish certain enumerated public interest goals. These arguments are without merit.

A. Section 65-4-201(d) is Not Competitively Neutral

Section 65-4-201(d) is, quite simply, an absolute barrier to competitive entry by telecommunications carriers in areas of Tennessee served by incumbent LECs with fewer than 100,000 access lines within the state (including carriers like Tennessee Tel. with between 75,000 and 100,000 access lines). The statute, on its face, categorically prohibits any entity from competing with incumbent LECs that qualify as rural LECs under Tennessee law. The TRA distorts the "competitively neutral" standard to mean that it can prevent competitive entry so long as no competitor is allowed to compete with the incumbent LEC: "§ 65-4-201(d) is competitively neutral because its restriction on entry into the service areas of small local exchange companies applies to *all telecommunications service providers* within the State."[19] The absurdity of this argument is

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[18] Denial Order at 8.

[19] Denial Order at 10 (emphasis added).

readily apparent. No legitimate reading of the term "competitively neutral" can lead to the conclusion that a statute which prevents all new entrants from competing with the incumbent is permissible. Section 253(b)'s competitive neutrality requirement was intended to ensure that no individual entity, *particularly the incumbent*, can receive preferential treatment over other CLECs. The TRA argues that Section 65-4-201(d) is competitively neutral since it represents a blanket exclusion of all new entrants from competing with the incumbent LEC. This argument completely clouds the true issue and should summarily be rejected by this Commission. Furthermore, as will be discussed in more detail below, the Commission has twice rejected rural incumbent protection provisions that are virtually identical to Section 65-4-201(d) on the grounds that the statutes are not competitively neutral. The Commission held that rural incumbent protection provisions award "incumbent LECs the ultimate competitive advantage -- preservation of monopoly status -- and saddles potential new entrants with the ultimate competitive disadvantage -- an insurmountable barrier to entry."[20] In view of Section 253(b)'s competitive neutrality requirement mandate, as interpreted by this Commission, Section 65-4-201(d) must be preempted.

B. The 1996 Act Explicitly Rejected the Implicit Universal Service Subsidy Mechanisms Supported by the TRA

In its Denial Order, the TRA stated that "§ 65-4-201(d) is essential to preserving universal service in Tennessee, protects the public safety and welfare, ensures the continued quality of telecommunications services and safeguards the rights of consumers."[21] The TRA

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20 *Silver Star* at ¶ 42.

21 Denial Order at 8.

> so concluded on the basis that many of the small, independent local exchange telephone cooperatives in Tennessee serve small areas with relatively few customers, and, typically, such small serving areas include a few large business customers whose revenues support the provision of affordable service to the companies' residential customers. If a competitor were to begin serving the large business customers of the incumbent, a significant amount of universal service support could be lost, with residential and business rates having to suffer an increase in order to make up for possible lost revenue. The [TRA] further concluded that such rate increases could jeopardize universal service within Tennessee.

Id. In Section 254 of the 1996 Act, Congress specifically rejected the universal service paradigm about which the TRA expresses concern. Section 254 states that universal service support "should be explicit."[22] More particularly, Congress directed that the existing system of implicit subsidies, such as the business-to-residential subsidy to which the TRA referred, should be rejected in favor of explicit subsidy mechanisms.[23] In any event, as stated previously, Congress did not envision that states would attempt to protect their existing universal service systems by enacting absolute barriers to competitive entry. Congress established the "competitive neutrality" requirement to ensure that states promulgate rules that are consistent with the 1996 Act's procompetitive framework, even if a state's concerns over universal service are legitimate.

The TRA went to great lengths in its Denial Order to demonstrate that the legislative history behind Section 65-4-201(d) mandates its conclusion. The TRA stated the following:

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[22] 47 U.S.C. § 254(e)-(f) (1996).

[23] Joint Explanatory Statement of the Committee of the Conference (H.R. Rep. No. 458, 104th Cong., 2d Sess.) at 131.

> Among other things, Section 65-4-201(d) ensures that for a period of time universal service is not disrupted while permanent universal service mechanisms are considered in the more rural areas of the state. The general assembly concluded that prematurely opening up the more rural areas of the state to competition without some transition period could result in untold consequences that may have substantial harmful effects on universal service in said areas.[24]

Nothing in the legislative history of § 65-4-201(d) supports the TRA's assertions that the Tennessee General Assembly enacted the statute due to universal service concerns. In fact, the limited legislative history that addresses § 65-4-201(d) supports the opposite conclusion, and reveals that § 65-4-201(d) was enacted due to the lobbying efforts of rural LECs, and that the Tennessee General Assembly expressed concern that Tennessee residents in rural areas would be denied the benefits of competition if the provision were adopted.[25] However, Section 65-4-201(d) was passed since the General Assembly was of the view that no competitors would be interested in serving rural areas. *Id.* The TRA's reliance on non-existent legislative history clearly demonstrates that the TRA was searching for a way to uphold an antiquated statute. By enforcing Section 65-4-201(d), the TRA has not only violated Section 253(a) of the 1996 Act, but has harmed Tennessee consumers by foreclosing competitive service offerings being made available to them. There are many ways that the TRA could ensure that universal service in Tennessee is properly maintained. Prohibiting competition is not one of them.

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[24] Denial Order at 9.

[25] *See Senate State and Local Government Committee Consideration of Telecommunications Bills*, Committee Meeting of April 18, 1995, attached hereto as Exhibit G.

C. Section 65-4-201(d) is Not Necessary to Protect the Public Safety and Welfare

Section 65-4-201(d) is not necessary to protect the public safety and welfare of Tennessee consumers. As an initial matter, the TRA has not in any way demonstrated that the presence of a competitive choice among rural customers in Tennessee would be to the detriment of those consumers. Rather, the TRA has merely made unsubstantiated assertions that competition in areas served by incumbent LECs with fewer than 100,000 access lines "could jeopardize universal service within Tennessee." *Denial Order* at 9. Furthermore, even if the TRA had legitimate public interest concerns, the enforcement of Section 65-4-201(d) does not advance them. The Commission has consistently noted that Congress envisioned that "States and localities would enforce the public interest goals delineated in Section 253(b) through means other than absolute prohibitions on entry, *such as clearly defined service quality requirements or legitimate enforcement actions.*"[26] Nothing in the denial of the public interest benefits of competition to Tennessee consumers directly aids universal service.

Hyperion asks this Commission to conclude that categorical barriers to entry cannot be tolerated under the 1996 Act. In denying Hyperion's application, the TRA went to great lengths to uphold the validity of a statute which clearly has been superseded by federal law. Indeed, in its Denial Order, the TRA itself stated that it "fully recognizes and respects the possibility that the FCC's application of Section 253(a) in circumstances similar to those presented in this matter may eventually become the law of the land." *Denial Order* at 10. However, the TRA concluded that "[a]t this early stage of the development of the interpretation of Section 253(a), however, the [TRA]

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[26] Classic at ¶ 38; Silver Star at 42 (emphasis added).

has determined that it would be premature to capitulate at this point...." *Denial Order* at 10-11. Contrary to the assertions of the TRA, this Commission has made it very clear that "section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality." *Silver Star* at ¶ 38. Thus, Hyperion requests that this Commission once again offer guidance to competitors and regulators alike as to the proper application of Section 253(a), and as to the scope of the rural LEC exemption under federal law.

IV. The Commission Has Preempted Incumbent LEC Protection Provisions That are Virtually Identical § 65-4-201(d), and Orders Enforcing Such Statutes

The Commission has twice considered statutory provisions that are virtually identical to § 65-4-201(d), and has preempted both statutes as violative of § 253(a) of the 1996 Act.

A. The Silver Star Decision.

Silver Star is an incumbent LEC certificated to provide local exchange service in western Wyoming. It applied to the Wyoming PSC to become certificated to provide local exchange service in nearby Afton, Wyoming. The incumbent LEC serving Afton opposed Silver Star's application. The Wyoming PSC denied Silver Star's application, relying exclusively on a provision in the Wyoming Act which provides that

> Prior to January 1, 2005, in the service territory of a local exchange telecommunications company with thirty thousand (30,000) or fewer access lines in the state, the commission shall, after notice and opportunity for hearing, issue a concurrent certificate or certificates of public convenience and necessity to provide local exchange service, only if, the application clearly shows the applicant is willing and able to provide safe, adequate and reliable local exchange service to all persons within the entire existing local exchange area for which certification is sought and the incumbent local exchange service provider: (i) Consents to a concurrent certificate; or (ii) Is unable or unwilling to provide the local exchange service for which the concurrent certificate is sought; or (iii) Fails to protest the application for

> the certificate after notice and opportunity for hearing; or (iv) Has applied for and received a concurrent certificate to provide competitive local exchange telecommunications services in any area of this state.[27]

Silver Star petitioned the Commission to preempt this provision of the Wyoming Act, and the Wyoming PSC's order denying its certification application (the "Wyoming Order"). Pursuant to its statutory authority under Section 253(d) of the 1996 Act, the Commission preempted both the statute and the Wyoming Order. In holding that the incumbent protection provision of the Wyoming Act violates Section 253(a), the Commission noted that "section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality." *Silver Star* at ¶ 38. An absolute prohibition on competitive entry "is precisely the type of action Congress intended to proscribe under Section 253(a)." *Silver Star* at ¶ 39. In keeping with the direction of Section 253(d) to preempt only "to the extent necessary," the Commission did not order the Wyoming PSC to grant Silver Star's certification application. However, the Commission stated that it "expect[s] that the Wyoming Commission will promptly respond to any request by Silver Star to reconsider Silver Star's application for a concurrent CPCN to serve the Afton exchange consistent with the Communications Act and our decision to preempt the enforcement of the *Wyoming Order* and the Wyoming Act's rural incumbent protection provision." *Silver Star* at ¶ 38.

Having determined that the incumbent protection provision of the Wyoming Act violates Section 253(a), the Commission next examined whether the provision falls within Section 253(b)'s exception to Section 253(a)'s proscriptions. The Commission noted that "Section 253(b) preserves

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[27] WYO. STAT. ANN. § 37-15-201(c) (1995) (emphasis added).

a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) 'competitively neutral'; (ii) consistent with the Act's universal service provisions; and (iii) 'necessary' to accomplish certain enumerated public interest goals." *Silver Star* at ¶ 40. The Commission determined "*that the rural incumbent protection provision is not competitively neutral...the rural incumbent protection provision awards those incumbent LECs the ultimate competitive advantage -- preservation of monopoly status -- and saddles potential new entrants with the ultimate competitive disadvantage -- an insurmountable barrier to entry.*" *Silver Star* at ¶ 42.

B. The Texas Preemption Decision.

On May 10, 1996, the Texas Public Utility Commission ("Texas PUC") filed a petition requesting that the Commission determine whether certain provisions of the Texas Public Utility Act of 1995 ("PURA95")[28] violate § 253 of the 1996 Act and must be preempted ("Texas Preemption Decision").[29] Among the numerous issues considered by the Commission in the Texas Preemption Decision was whether PURA95 § 3.2531(h), an incumbent LEC protection provision, violates Section 253(a) of the 1996 Act.

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[28] TEX. REV. CIV. STAT. ANN. art. 1446c-o (West Supp. 1996).

[29] *In the Matter of the Public Utility Commission of Texas*, CCBPol 96-13, *The Competition Policy Institute, IntelCom Group (USA), Inc., and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc.*, CCBPol 96-14, *Teleport Communications Group, Inc.*, CCBPol 96-16, *City of Abilene, Texas*, CCBPol 96-19, *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order (rel. Oct. 1, 1997).

PURA95 § 3.2531(h) is a statutory provision prohibiting the Texas Commission from granting Certificates of Operating Authority ("COAs"),[30] before September 1, 1998, in an exchange of an incumbent LEC serving fewer than 31,000 access lines in Texas. After noting that "section 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that 'prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service, the Commission stated:

> that the moratorium on the grant of COAs in exchanges of incumbent LECs serving fewer than 31,000 access lines, set forth in PURA95 section 3.2531(h), violates the terms of section 253(a) of the Act standing alone. [The Commission] also find[s] that this PURA95 provision does not fall within the protected class of state regulation described in section 253(b) of the Act, and [the Commission] therefore preempt[s] the enforcement of this provision pursuant to section 253(d). PURA95 section 3.2531(h) flatly prohibits the Texas Commission from granting a COA in the specified territories, thus precluding an entity holding a COA from providing *any* service in such markets.

Id. at ¶ 106-07 (emphasis supplied). In holding that PURA95 section 3.2531(h) is not permissible under section 253(b), the Commission characterized such a blanket prohibition of competition as neither competitively neutral nor necessary to achieve any of the policy goals articulated in section 253(b). Thus, the Commission concluded that section 3.2531(h) was in direct conflict with section 253(a), which is designed to prevent such restrictions on entry. Moreover, the Commission concluded that PURA95 section 3.2531(h) is not otherwise permissible under section 253(b).

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[30] A COA in Texas is the equivalent of a Certificate of Public Convenience and Necessity in Tennessee.

V. Section 65-4-201(d) is Preempted By Federal Law

Silver Star and the *Texas Preemption Decision* make it clear that statutory provisions such as § 65-4-201(d) of the Tennessee Code cannot stand under Section 253(a) of the 1996 Act. Section 65-4-201(d) is an absolute prohibition against competition in areas of Tennessee served by incumbent LECs having fewer than 100,000 access lines.[31] The Commission has consistently recognized that Section 253(a) of the 1996 Act, *at the very least*, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality.[32] Significantly, for purposes of the Commission's analysis, the statutes at issue in *Silver Star* and the *Texas Preemption Decision* were substantially less onerous than Section 65-4-201(d). At issue in *Silver Star* was a Wyoming statute that prohibited competition in areas served by an incumbent LEC with 30,000 or fewer access lines. The statute that ultimately was preempted by the *Texas Preemption Decision* prohibited competition in areas served by an incumbent LEC with fewer than 31,000 access lines. Section 65-4-201(d) prohibits competition in areas served by an incumbent LEC with anything fewer than *100,000* access lines, thus providing large and powerful incumbent LECs such as Tennessee Tel. (which has nearly 100 times more access lines in Tennessee than Hyperion), blanket protection against competition.

In applying relevant preemption precedent, it becomes clear that Section 65-4-201(d) is impermissible on several grounds. As noted previously, preemption occurs when Congress, in

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[31] Unless, of course, the incumbent LEC voluntarily elects to allow competitors into its service areas.

[32] *See Classic Telephone* at ¶ 25; *Silver Star* at ¶ 38; *Texas Preemption Decision* at ¶ 106-07.

enacting a federal statute 1) expresses a clear intent to preempt state law; 2) when there is an actual or outright conflict between federal and state law; 3) where compliance with both federal and state law is in effect impossible; 4) where there is implicit in federal law a barrier to state regulation; 5) where Congress has legislated comprehensively (thus occupying an entire field of regulation and leaving no room for the States to supplement federal law); or 6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[33]

In enacting section 253(a), Congress expressed its clear intent to preempt State or local laws laws that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Moreover, in section 253(d), Congress specifically provided for Commission preemption of any State or local law that violates section 253(a). There is a direct conflict between section 65-4-201(d) of the Tennessee Code, which prohibits competition in areas served by incumbent LECs with fewer than 100,000 access lines, and section 253(a) of the 1996 Act, which prohibits State or local governments from enacting laws prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service. Congress' intention to preempt statutes such as section 65-4-201(d) is clear and unambiguous, and Congress explicitly references both interstate *and* intrastate telecommunications services in Section 253(a).

The 1996 Act is a comprehensive legislative enactment that sought to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all

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[33] Louisiana P.S.C. v. FCC at 368-69.